IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
February 13, 2007 Session

STATE OF TENNESSEE v. LADARIUS L. REFFEGEE

Direct Appeal from the Criminal Court for Davidson County
No. 2004-C-2504 Steve Dozier, Judge

No. M2005-02891-CCA-R3-CD - Filed June 27, 2007

The defendant, Ladarius L. Reffegee, was convicted by jury of second degree murder and carrying a handgun with intent to go armed. Subsequently, the defendant pled guilty to possession of cocaine with the reservation of a certified question of law for appeal. For his convictions, the defendant received a total effective sentence of twenty-three years imprisonment. In this appeal, the defendant contends that: (1) his motion to suppress evidence should have been granted because his vehicle was subjected to an unlawful search by law enforcement; (2) the state violated his due process rights by failing to divulge evidence favorable to the defense; and (3) the state's comment on the defendant's failure to produce a witness violated his due process rights. Following our review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which DAVID G. HAYES and JERRY L. SMITH, JJ., joined.

Mark C. Scruggs, Nashville, Tennessee, for the appellant, Ladarius L. Reffegee.

Robert E. Cooper, Jr., Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Amy Eisenbeck and Rachel Sobrero, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTS

The facts giving rise to this appeal are as follows. James Pleasant, the victim, was shot and killed at Club Prism, a night club on Nolensville Road, in the early morning hours of July 12, 2004. Jonathan Pleasant, the victim's younger brother, testified that a week prior to the shooting, the victim was involved in a minor automobile accident near Club Dream, a night club in downtown Nashville. The driver of the other automobile was Zedrick Brown. After the accident, the victim offered to pay

money for the minor damage to Brown's car and everyone went their separate ways. Jonathan noted that a Corey McGee was with Brown at the time of the accident but the defendant was not.

Jonathan Pleasant testified that a few minutes after the accident, he and the victim met the victim's friend, Bubba Stone at another local club, called Night Life. Jonathan observed that Brown, McGee, and Julius Johnson were standing in line at this club. At this time, Jonathan observed Stone shoot McGee in the stomach. Jonathan stated that the defendant was not present at the time. On cross-examination, Jonathan acknowledged that his brother, the victim, was a member of a gang, the Tre-07 Underground Crips. Jonathan also acknowledged that after the earlier car accident some individuals were waiving guns around. However, Jonathan stated that the victim and Brown were acting calm in response to the accident.

Tomario Pleasant, the victim's cousin, testified that the night the victim was killed, he and the victim were at Club Prism. At some point, both men left the club and headed back to the car. Tomario got into the car, but the victim turned around and headed back to the club, saying "he would be right back." Tomario then heard two gunshots, got out of the car, walked back to the club, and saw the victim lying on the ground. On cross-examination, Tomario acknowledged that the victim was known to carry a gun in the past, but he did not have one on him the night he was shot and killed.

Ashley Caulder testified that she was at Club Prism in the early morning hours of July 12, 2004 and saw the defendant talking to the victim outside the club. The conversation appeared to be friendly. She heard the victim say he was leaving and saw him walk away, then she heard three or four gunshots. When she looked, she saw the defendant "over the top of [the victim], shooting." She heard the defendant say "[s]omeone is shooting, someone is shooting." Ms. Caulder also noted that the defendant's "left hand was messed up or something." Ms. Caulder stated that she did not see the victim with a gun.

Julius Johnson testified that he was friends with the defendant, McGee, and Brown and had grown up with them. He stated that he was in another car when the accident between the victim and Brown took place. He recounted that Brown and the victim did not "get into a fight or anything," rather they were talking. Johnson stated that he was at the club when McGee got shot. Johnson acknowledged that the victim did not shoot McGee. Johnson recalled that on July 11, 2004, he and some other people including the defendant decided to go to Club Prism. The defendant drove Johnson's car because he had a driver's license. Johnson lost contact with the defendant until after the shooting when he and the defendant met up in the parking lot near Johnson's car. However, Johnson went back to the club and the defendant left with Johnson's car. According to Johnson, people were running everywhere, panicking, trying to get safe.

Several police officers testified regarding their role in securing the crime scene and the recovery and collection of evidence. According to their testimony, the police arrived a few minutes after the shooting and secured the crime scene. Four spent bullet casings were recovered from the crime scene. Two projectile bullets were recovered from the victim's body after the autopsy. No

gun was found on the victim's person or at the crime scene. After questioning the security personnel at Club Prism, the shooter was identified as wearing a gray t-shirt, dark shorts, and he had a deformed left hand. Eventually, the defendant became a suspect. Ms. Caulder was asked to view a photographic lineup whereupon she identified the defendant as the shooter. Based on her identification, a warrant was issued for the defendant's arrest.

Detective Charles Robinson of the Nashville Police Department testified that he arrested the defendant at the Cumberland View Apartments. At the time of his arrest, the defendant was standing in the parking lot near his Suburban. After placing the defendant under arrest, Detective Robinson shined a flashlight into the rear area of the defendant's vehicle and noticed the barrel of a handgun lying on the floorboard with a bunch of other stuff. Detective Robinson then told the defendant that he could either give consent to search his vehicle or a search warrant would be obtained. The defendant agreed to the search with the condition that his vehicle would not be impounded or taken so that his girlfriend could use it to get to work. Detective Robinson agreed and the defendant signed a consent to search form. After searching the defendant's vehicle, Detective Robinson found two guns.

Police Officer George Bouton testified as to the identification of the weapons found in the defendant's vehicle on July 15, 2004. He identified the two guns as a P-89 Ruger, nine-millimeter handgun and a Tec DC9, nine-millimeter handgun. Officer Bouton noted that both guns were loaded and explained how he documented and labeled the guns and the ammunition retrieved from the guns. Officer Michael Pyburn of the Nashville Police Department testified as an expert in ballistic and firearms examination. According to Officer Pyburn, the bullet casings recovered from the crime scene and the bullet projectiles recovered from the victim's body were found to have been discharged from the Ruger, nine-millimeter, semi-automatic handgun. Dr. Feng Li, the county's assistant medical examiner, testified that the victim's autopsy report revealed that the victim was shot once in the chest and once in the back and died as a result. At the close of the state's proof, the jury was allowed to view the defendant's hands.

The defendant testified on his own behalf. He stated that he knew his friend, McGee, got shot by Stone over a car accident involving Brown and the victim. According to the defendant, the victim and Stone were members of the Tre-07 Underground Crips, a real bad gang in Nashville. The defendant further asserted that the victim was known to be violent and to carry a gun. On July 11, 2004, the defendant went out with his friends to Club Prism. The defendant drove Johnson's vehicle because he had a driver's license. When they reached the club, the defendant began to get nervous about the crowd and asked another friend, Anthony Dyer, for a gun, and was given the Ruger. The defendant claimed that he wanted the gun for protection because he had previously witnessed violence at the club and at "the VIP line, they don't search you . . . . All you got to do is just pay extra."

The defendant stated that he was denied entrance into the club, so he decided to go to the back of the club and "pay . . . extra to get in through the back." While walking around to the back of the club, the defendant encountered the victim. According to the defendant, the victim

approached him and said, "Are y'all n**ers looking for me?" The defendant responded, "Dude, I don't even know you . . . [h]ow am I gonna be looking for you?" The defendant noted that at this time he saw the victim waiving something in his hand. Further conversation ensued, where the victim identified himself as part of the Tre-07 gang and accused the defendant of being part of the group looking for him. The defendant asserted that while the victim was yelling at him, the victim had his right hand on his waist belt and was "looking at me . . . real eager like he just gonna pull it out and just shoot me." The defendant stated that he raised his shirt and turned in a circular motion to show the victim that he did not have a weapon. Then, he took the gun from his groin area, shot the victim, and took off running. The defendant acknowledged that he did not see the victim pull out a gun, but asserted that he was 100% certain the victim had a weapon. The defendant asserted that he left the club in Johnson's vehicle because he did not know if he shot the victim or not, was scared of the gang, and was afraid for his life.

The defendant testified that he volunteered to give a statement to police a couple of days after the shooting, but he lied to police because he was afraid someone would come after him and his family. The defendant claimed that he had the two guns in his vehicle for protection.

Julius Johnson and Zedrick Brown were called to testify on behalf of the defendant. Johnson testified that the victim was part of a Crip gang, which had a reputation for violence. Johnson also claimed that Club Prism had a reputation for having trouble and violence. Brown testified that the Tre-07 Underground Crips had a reputation for violence. Brown further testified that Club Prism had a reputation for problems and violence and that "it was so simple to get a gun in Prism."

Detective Robinson was also called to testify on the defendant's behalf. Detective Robinson acknowledged that he met with the members of the victim's family. He stated that certain members of the victim's family acknowledged that the victim was a member of the Tre-07 Underground Crips and the victim was known to carry a gun on his person or inside his vehicle.

ANALYSIS

I. Motion to Suppress

On appeal, the defendant contends that his motion to suppress evidence should have been granted because his vehicle was subjected to an unlawful search.

From the record of the suppression hearing, we glean the following facts. Detective Robinson testified that during the course of his investigation into the shooting death of James Pleasant, the defendant became a suspect and a warrant was issued for his arrest. A few days later, the defendant was located in the parking lot of an apartment complex where his grandmother resided. The defendant was standing outside his vehicle with a telephone in his hand. Detective Robinson along with other police detectives arrested the defendant and searched his person in order to ensure the defendant did not have "any weapons on him." At this time, another detective went over to the defendant's vehicle. The detective returned and informed Detective Robinson that there was a weapon in the vehicle. Detective Robinson went back to the vehicle with the other detective;

whereupon, the other detective shined a flashlight into the back of the defendant's vehicle and Detective Robinson saw a gun. Detective Robinson informed the defendant that he could either give consent to search his vehicle or a search warrant would be obtained. The defendant agreed to the search with the condition that his vehicle would not be impounded or taken so that his girlfriend could use it to get to work. Detective Robinson agreed and the defendant reviewed and signed a "Consent to Search Form." Afterwards, the defendant told Detective Robinson that "you gonna find another gun in there." Police detectives then searched the defendant's vehicle and took photographs of the evidence. Two guns and some drugs were found in the defendant's vehicle.

Antonio Jones testified on behalf of the defendant. Mr. Jones testified that he was present when the defendant was arrested. According to Mr. Jones, the police never looked into the defendant's vehicle prior to searching it. Mr. Jones also asserted that the tint on the windows of the defendant's vehicle was too dark to see through even with the use of a flashlight. Mr. Jones also insisted that the police detectives told the defendant he was signing a "no-tow slip" rather than a consent to search form. However, Mr. Jones acknowledged that he did not read the document.

The defendant testified that he was arrested while standing about fifteen feet from his vehicle. After he was arrested, the police detectives took the keys from his pocket and conducted a search of his vehicle without his consent. Later, the defendant consented to the search of his vehicle and signed the consent to search form so his fianceé could take the vehicle rather than having the police take it. According to the defendant, the guns were located under the back passenger seat of his vehicle and had a t-shirt over them, therefore, the guns were not visible.

In its written findings, the trial court accredited the testimony of Detective Robinson and determined that the search of the defendant's vehicle was lawful because the search was incident to an arrest, one of the guns was in plain view, and the defendant voluntarily and knowingly consented to the search. Based on its findings, the trial court denied the defendant's motion to suppress.

When reviewing the trial court's decision on a motion to suppress, this court conducts a de novo review of the trial court's conclusions of law and application of law to facts. *See State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001). However, the trial court's findings of fact are presumed correct unless the evidence contained in the record preponderates against them. *See State v. Daniel*, 12 S.W.3d 420, 423 (Tenn. 2000). "Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *State v. Lawrence*, 154 S.W.3d 71, 75 (Tenn. 2005) (quoting *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). Moreover, the prevailing party is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence. *State v. Hicks*, 55 S.W.3d 515, 521 (Tenn. 2001) (quoting *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998).

Upon review, we conclude that the search was lawful. "A warrantless search is presumed unreasonable under both the federal and the state constitutions, and evidence seized from the warrantless search is subject to suppression unless the state demonstrates by a preponderance of the

evidence that the search was 'conducted pursuant to one of the narrowly defined exceptions to the warrant requirement.'" *State v. Chearis*, 995 S.W.2d 641, 643 (Tenn. Crim. App. 1999) (quoting *State v. Simpson*, 968 S.W.2d 776, 780 (Tenn. 1998)). One such exception is the "plain view doctrine." Under the plain view doctrine, three requirements must be met to justify a warrantless search and seizure of property: (1) the items seized must be in plain view; (2) the initial intrusion that enables the police to view the items seized must be lawful; and (3) the incriminating nature of the items seized must be readily apparent. *See State v. Cothran*, 115 S.W.3d 513, 524-25 (Tenn. Crim. App. 2003); *see also Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993).

Although the defendant disputed the visibility of the gun through his tinted windows, the trial court accredited the testimony of Detective Robinson over that of the defendant and the defendant's witness, Mr. Jones. Detective Robinson testified that the defendant became a suspect in the shooting death of the victim, James Pleasant, and a warrant was issued for the defendant's arrest. Accordingly, he and other detectives were lawfully present in the parking lot to arrest the defendant pursuant to the arrest warrant. According to Detective Robinson, the defendant was standing near his vehicle, which was parked in a public parking lot. With the defendant in near proximity to his vehicle, police detectives looked into the vehicle and saw a gun. Although police detectives used a flashlight to illuminate the vehicle's interior, such use of a flashlight is permissible. *See State v. Eddinger*, 112 S.W.3d 148 (Tenn. Crim. App. 2002). Since the initial intrusion was lawful and the gun was discovered by lawful means, the police could seize it without a warrant.

In addition, the trial court found that the defendant knowingly and voluntarily gave his consent to the search, another exception to the warrant requirement. *State v. Troxell*, 78 S.W.3d 866, 871 (Tenn. 2002) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973)). Notably, the consent to search must be "unequivocal, specific, intelligently given, and uncontaminated by duress or coercion." *Simpson*, 968 S.W.2d at 784. However, the "scope of consent is not based on the subjective intentions of the consenting party or the subjective interpretations of the searching officer." *Troxell*, 78 S.W.3d at 871-72. Instead, the objective standard of a reasonable person is applied in determining the scope of consent. *Id.* at 872. The question of whether an accused voluntarily consented to a search is a question of fact to be determined by looking at the totality of the circumstances. *State v. Ashworth*, 3 S.W.3d 25, 29 (Tenn. Crim. App. 1999). In this case, the issue of consent is almost entirely a matter of credibility. As previously mentioned, credibility determinations belong to the trial court. Here, the trial court accredited Detective Robinson's testimony that the defendant voluntarily and intelligently provided written consent to search his vehicle because he wanted his girlfriend to have the vehicle to get to work. Also, the defendant admitted that he signed the consent form because he wanted his fianceé to be able to use his vehicle. The evidence in the record does not preponderate against the trial court's findings, and therefore, we conclude that the court properly denied the motion to suppress.[1]

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[1] We note that the trial court also found the search lawful as a "search incident to arrest" pursuant to *Thornton v. United States*, 541 U.S. 615 (2004). In *Thornton*, the United States Supreme Court held that a police officer may search a car following a lawful custodial arrest even if the person arrested is no longer inside the car. *Id.* at 617. The Court stated that in "all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns (continued...)

II. *Brady* Violation

The defendant also contends that the state violated his due process rights by failing to divulge evidence favorable to the defense. Specifically, the defendant submits that the state failed to provide details of Ashley Caulder's detention in a halfway house as opposed to jail in the days prior to the defendant's trial. Because Ms. Caulder was the state's key eyewitness, the defendant contends that the state's failure to provide such information constitutes a denial of due process. In rebuttal, the state submits that there was no agreement made with Ms. Caulder in exchange for her testimony at trial. The state also submits that its failure to divulge Ms. Caulder's detention status in the few days preceding the trial was not prejudicial to the defense.

At the hearing on the motion for a new trial, the defense attorney explained his understanding of the facts surrounding this issue:

> [I]f the Court recalls, [Ms. Caulder] was rather hard to locate; and I believe that a bench warrant was issued for her, and they brought her in.
>
> The first time I'd ever even spoken with her was that Friday, before we had the trial. And, at that point in time, she would not speak to me . . . .
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> My impression was that she was gonna be locked up over the weekend; but, after the Jury was charged and during deliberation . . . one of the persons associated with the District Attorney's Office advised me that she had been staying in a hotel or apartment or . . . some place that had been furnished to her by the State . . . .

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[1](...continued)
regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle." *Id.* at 621. *Thornton* extended the holding in *New York v. Belton*, 453 U.S. 454 (1981), a case establishing the constitutionality of searches incident to a lawful arrest, to cover such situations where "recent occupants" of vehicles are arrested. However, *Thornton* fails to precisely define who qualifies as a "recent occupant," but remarks only that "an arrestee's status as a 'recent occupant' may turn on his temporal or spatial relationship to the car at the time of the arrest and search." *Id.* at 622.

We decline to address the trial court's findings on this issue for two reasons: First, it is not clear from the transcript of the motion to suppress whether the police detectives ever saw the defendant in his vehicle before the arrest, whether the defendant was arrested in close proximity to his vehicle, whether the defendant had been in his vehicle prior to being arrested, and whether police detectives conducted the search incident to arrest because of the specific exigent need to prevent destruction of evidence or promote officer safety. Accordingly, *Thornton* might not apply to the facts of this case. Also, this issue was not raised or argued by either party during the hearing on the motion to suppress, but rather, the trial court raised the issue *sua sponte* in its written order as part of its rational for finding the search lawful. Second, and more important, it is unnecessary to determine whether the search was lawful as a search incident to an arrest in light of our aforementioned determination regarding the plain view of the gun and the defendant's consent to search the vehicle.

> . . . [S]he was free over the weekend, and I didn't know that; and, obviously, I was not able to cross-examine her with regard to what those arrangements were, because I had assumed that she'd been in jail all weekend.

In response, the state offered the following explanation:

> [Defense counsel] is correct, that our witness was very difficult to get in touch with. And a bench warrant was issued for her and was served on her the Thursday before the Monday trial.
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> She was taken into custody, she did spend the night in jail, on that Thursday night. She had just had a baby, I believe, a couple of weeks before she was arrested; and she was taken from her baby, when she was arrested on the bench warrant, and taken into custody.
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> The State did not enter into any kind of agreement with her. . . . [S]he stayed at a halfway house, where she was not allowed to leave.
>
> And she was on electronic monitoring the entire time, with instructions to the halfway house to call us, so that we could have her arrested if she left, and with instructions to the electronic monitoring that, if she even stepped outside of the halfway house, that she was to be taken immediately back to jail.

In a written order, the trial court found the following in relevant part:

> Even if the prosecutor erred in not revealing this evidence, this Court fails to see how this "error" harmed the defendant. Ms. Caulder was thoroughly cross-examined and was asked about being in jail and she testified that "they came and picked me up," referring to the district attorney having her arrested. However, the defense did not follow up and inquire as to whether she was allowed her freedom for the weekend or what arrangements, if any, had been made. Notwithstanding, the prosecutor did further ask the witness about her testimony by asking on re-direct "are you gaining anything from your testimony today?" and "have I promised you anything?". The witness replied in the negative to both of these questions. Ms. Caulder was not given any concessions or promised anything for her testimony nor was any proof offered at the hearing for new trial that there was any quid pro quo arrangement between the witness and the state. In fact, she had some of her liberties taken away for the weekend. Given the cross-examination of the witness and the nature of the "deal," the Court fails to see how this information harmed the defendant.

In *Brady v. Maryland*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the

prosecution." 373 U.S. 83, 87 (1963). Of significance, impeachment evidence, as well as exculpatory evidence, is evidence favorable to an accused. *See United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). To expound, favorable evidence includes evidence that "provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness." *Johnson v. State*, 38 S.W.3d 52, 56-57 (Tenn. 2001) (citations omitted). "When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule." *Giglio*, 405 U.S. at 154 (internal quotation omitted); *see also Hartman v. State*, 896 S.W.2d 94, 101 (Tenn. 1995).

> However, to prove a *Brady* violation, a defendant must demonstrate the following:
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> 1) that the defendant requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not);
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> 2) that the State suppressed the information;
>
> 3) that the information was favorable to the accused; and
>
> 4) that the information was material.

Johnson, 38 S.W.3d at 56. The defendant bears the burden of proving a *Brady* violation by a preponderance of the evidence. *See State v. Edgin*, 902 S.W.2d 387, 389 (Tenn. 1995). The standard for measuring whether the suppressed information is material is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. In other words, a defendant must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); *see also Irick v. State*, 973 S.W.2d 643, 657 (Tenn. Crim. App. 1998) (citing *Edgin*, 902 S.W.2d at 390). Thus, the materiality of the suppressed evidence must be evaluated within the context of the entire record as to how it impacts the innocence or guilt of the accused.

We agree with the determination of the trial court and conclude that the defendant failed to prove that his trial would have been different had Ms. Caulder's detention status been disclosed by the state. While the fact that Ms. Caulder was detained in a halfway house rather than the county jail may have provided some impeachment value, such evidence in no way exculpates the defendant. Importantly, the defendant testified at trial and admitted that he was the shooter but asserted a theory of self-defense. In addition, the record reflects that the defendant was aware that Ms. Caulder was reluctant to testify and had ample opportunity to question her about this fact. Furthermore, Ms. Caulder was thoroughly cross-examined about her identification of the defendant as the shooter and the defendant presented no proof that Ms. Caulder was provided an incentive to testify favorably for

the state. Thus, there is no reasonable probability that had the impeachment evidence been disclosed to the defendant prior to trial, the result of his trial would have been different.

III. State Prosecutor's Reference to "Missing Witness"

The defendant also contends that the trial court erred in allowing the state prosecutor to comment on the defendant's failure to produce a witness in support of his claim of self-defense. The defendant contends that the state's comment constitutes reversible error because the comment improperly shifted the burden of proof regarding his theory of self-defense.

The record reflects that in closing argument, defense counsel contended, *inter alia*, that the defendant acted in self-defense when confronted by the victim, whom was known to be a gang member. In rebuttal summation, the state prosecutor made the comment:

> Uh–one thing that I wanted to bring up is, if things happened the way . . . the defendant said they happened, then, he had a friend with him when he went to go and get the gun. And, he never made it back to the car. Well, where is that friend?

At this time, the defense objected to the prosecutor's comment as unfairly shifting the burden of proof to the defendant. The trial court responded, "[a]ll right. This is argument and I've already told the jury it's not proof and it's only supported if there is proof. So, go ahead." The prosecutor then continued summation.

It has long been recognized that closing argument is a valuable privilege that should not be unduly restricted. *See State v. Bane*, 57 S.W.3d 411, 425 (Tenn. 2001) (citing *State v. Bigbee*, 885 S.W.2d 797, 809 (Tenn. 1994)). However, closing argument "must be temperate, predicated on evidence introduced during the trial, relevant to the issues being tried, and not otherwise improper under the facts or law." *State v. Middlebrooks*, 995 S.W.2d 550, 557 (Tenn. 1999). Notably, the scope of closing argument is subject to the trial court's discretion and will not be reversed absent a clear showing of abuse of discretion. *See State v. Cauthern*, 967 S.W.2d 726, 737 (Tenn. 1998); *Smith v. State*, 527 S.W.2d 737, 739 (Tenn. 1975).

In measuring the prejudicial affect of an improper argument, this court considers the following factors: (1) the facts and circumstances of the case; (2) any curative measures undertaken by the court and the prosecutor; (3) the intent of the prosecutor making the statement; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength or weakness of the case. *See State v. Bough*, 152 S.W.3d 453, 463 (Tenn. 2004); *State v. Buck*, 670 S.W.2d 600, 609 (Tenn. 1984).

Although the prosecutor's comment was improper, the comment was not so prejudicial as to undermine the fundamental fairness of the defendant's trial. The comment at issue was not extensive and was only a small portion of the prosecutor's otherwise appropriate closing argument. Also, the defendant did not request a curative instruction, and trial court did not offer any. However, in its charge to the jury, the trial court did explain that the state had the burden of proof beyond a

reasonable doubt. Additionally, the trial court reminded the jury that statements and arguments of counsel were not evidence and could be disregarded if not supported by the evidence. Furthermore, in closing argument, both the prosecutor and defense counsel impressed upon the jury the presumption of innocence afforded to the defendant and the fact that the state had the burden of proving its case beyond a reasonable doubt. Thus, in this context, we determine the prosecutor's improper comment harmless error. *See Bough*, 152 S.W.3d at 463.

CONCLUSION

Based upon the foregoing review, we affirm the judgments of the trial court.

J.C. McLIN, JUDGE